Nos. 80-289 and 80-692

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854
AND UNITED MINE WORKERS OF AMERICA,
*Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD AND
AMAX COAL COMPANY, A DIVISION OF AMAX, INC.
*Respondents.*

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner*

v.

AMAX COAL COMPANY, A DIVISION OF AMAX, INC., *et al.*
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF OF AFL-CIO, SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AND NATIONAL STABILIZATION AGREEMENT OF THE SHEET METAL INDUSTRY TRUST FUND, AS AMICI CURIAE

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## QUESTION PRESENTED

Are trustees of a multi-employer pension and welfare trust fund established pursuant to § 302(c)(5) of the Labor Management Relations Act of 1947 "representatives for the purposes of collective bargaining or the adjustment of grievances" within the meaning of § 8(b)(1)(B) of the National Labor Relations Act?

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## INTEREST OF AMICI CURIAE *

Amicus curiae American Federation of Labor and Congress of Industrial Organizations is a federation of 104 national and international unions with a total membership of 13,500,000 working men and women.

Amicus curiae Sheet Metal Workers' International Association ("SMWIA") is an international union affiliated with the AFL-CIO.

Amicus curiae Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") is a trade association of sheet metal and air conditioning contractors in the United States and Canada, with approximately 2600 member contractors in the United States.

The memberships of each of these *amici* contribute to and/or participate in a number of multi-employer trust funds established and operated pursuant to § 302(c) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c), that offer substantial benefits to the fund participants and beneficiaries. Each *amicus* recognizes that multi-employer trust funds offer a unique vehicle for funding and providing employee benefits in a stable and efficient manner.

Amicus curiae National Stabilization Agreement of the Sheet Metal Industry Trust Fund ("SASMI") is a § 302(c) multi-employer trust fund created in 1973 in accordance with collective bargaining agreements between local member unions of SMWIA and various sheet metal contractors. SASMI is a separate entity, organized and administered independently of SMWIA, the local unions, and the local employers. The fund is operated for the sole and exclusive benefit of its participants and beneficiaries.**

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* Pursuant to Supreme Court Rule 36, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters of consent have been filed with the Clerk of the Court.

** The administration of SASMI and its status as a subject of collective bargaining was recently put in issue when an association

The issue presented in this case concerns the administration—indeed the very existence—of § 302(c) multi-employer trust funds and their role in the collective bargaining process. Each *amicus* has a vital interest in these matters.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a single issue of statutory construction: whether a union is forbidden from striking to obtain employer contributions to and other participation in a multi-employer trust fund, jointly administered by the union and the participating employers.

The Court of Appeals for the Third Circuit held that a trustee designated by an employer or group of employers to participate in administration of a pension or welfare trust fund under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), the provision governing the form and administration of such funds, is a representative "for the purposes of collective

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of employers filed unfair labor practice charges against amicus curiae SMWIA and the SMWIA's local union with which the employer association had signed a collective bargaining agreement, contending that these parties had violated § 8 of the National Labor Relations Act, 29 U.S.C. § 158, by insisting on SASMI and striking to ensure that the employers would include SASMI participation as one of the benefits of the contract. On review of those charges, the National Labor Relations Board rejected the very contention accepted by the Third Circuit in this case, and ruled that trustees of a multi-employer trust fund are not representatives for purposes of collective bargaining. The Board further held that SASMI's trustee designation clause—the provision that requires entering employers to accept the existing employer-appointed trustees until their successors are chosen in accordance with the SASMI Trust Agreement—is a mandatory subject of bargaining. Sheet Metal Workers' International Association, 234 N.L.R.B. 1238, 97 L.R.R.M. 1476 (1978). The Board's decision is currently under review by the United States Court of Appeals for the Fifth Circuit. Central Florida Sheet Metal Contractors Ass'n v. NLRB, No. 79-2396 (5th Cir. 1979).

bargaining" within the meaning of § 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B). On that basis the Third Circuit concluded that the union's strike to obtain Amax's agreement to participate in the fund was in violation of that provision because it coerced Amax "in the selection of [its] representatives for the purposes of collective bargaining."

The facts on which this decision is based make it clear that the necessary effect of the court of appeals' construction of § 8(b)(1)(B) is to prohibit *any* union strike in support of a demand for employer contribution to and participation in a multi-employer pension fund. Amax's objection was not that Amax would have no voice in the selection of the employer trustee in the multi-employer fund. Having participated in the fund prior to the negotiations at issue here, Amax had taken part in that selection. Rather, Amax's complaint was that, as one employer participant in the fund, it could not have *complete* control over the selection of the employer trustee.

Because it is impossible, by definition, for every employer participating in a multi-employer fund to have sole control over selection of the employer trustees, the decision below would always forbid a union strike in support of a demand that an employer provide pension or health benefits for his employees through a multi-employer trust fund rather than through a plan applicable only to that one employer.[1] That result, and the supporting

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[1] Pension and health benefits are not the only subjects affected by this ruling. Section 302(c)(5) applies to trust funds established for any of the following purposes: medical and hospital care, pensions on retirement or death, compensation (or insurance) for occupational disease or injury, disability and sickness insurance, or accident insurance, § 302(c)(5); "pooled vacation, holiday, severance or similar benefits" or to defray costs of apprenticeship or other training programs, § 302(c)(6); and group legal services, § 302(c)(8).

Section 302(c)(5) also prescribes the form and administration of funds that provide educational scholarships for employees and their families and child care centers for employees' dependents, § 302(c)(7), but with respect to funds for those purposes—unlike

decision of the Third Circuit, are contrary to the meaning and purpose of the statutes upon which the lower court's decision purports to rest.

In Part I we examine the legislative history of the Taft-Hartley Act, by which both § 8(b)(1)(B) and § 302(c)(5) were enacted into law. We show first that the concerns that Congress addressed in § 8(b)(1)(B) have no relation to an employer's participation in the administration of a multi-employer welfare fund under § 302(c)(5). Then we focus on three aspects of the legislative debate on Taft-Hartley which together demonstrate both that the problem addressed in § 8(b)(1)(B) is wholly distinct from that addressed in § 302(c)(5), and that Congress intended to deal with these two problems by separate solutions.

*First*, the legislative history of § 302(c) shows that the 1947 Congress did not intend to prohibit unions from bargaining for, and striking to obtain, employer participation in such multi-employer funds. That history shows that the dominant event that prompted the drive for legislation on this subject was a strike the previous year in the coal industry, in support of, among other demands, contribution from all mine operators to a United Mine Workers welfare fund. That strike and the demand for that fund were a focus of the debate in Congress, as both houses considered a variety of proposals for legislation concerning union benefit funds and multi-employer bargaining. When the debate was over and the votes were in, Congress had imposed certain limitations on the *form* and *use* of welfare funds by means of § 302(c)(5), but the sponsors of the legislation repeatedly asserted that they had taken no other action with respect to welfare funds. The sponsors plainly did not believe that they had limited the Mine Workers' right to bargain or strike

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funds for pensions, health benefits and the other subjects covered by § 302(c)(5), the Act expressly provides that neither the unions nor the employer is required to bargain about the establishment of such a fund, § 302(c)(7).

over the 1946 demand in the future, as long as the fund complied with § 302(c)(5).

*Second*, the legislative history shows that Congress did not regard the functions performed by the trustees who administer a § 302(c)(5) trust to be collective bargaining or grievance adjustment within the meaning of § 8(b)(1)(B). The statutory definition describes a process entirely different from that engaged in by trustees. The most important difference is that Congress took pains in Taft-Hartley to ensure that nothing in the Act would alter the fundamental principle of free collective bargaining and grievance adjustment—that the law does not require the union and employer to reach agreement, and when they reach an impasse they are entitled to resort to their respective econmic weapons. By sharp contrast, in § 302(c)(5) Congress provided a mechanism for *compulsory* arbitration of questions of trust administration on which the union trustees and employer trustees reach a deadlock.

*Third*, Congress provided in § 302(c)(5) that the fund must take the form of a trust, invoking the common-law principles that define the fiduciary obligations of a trustee. Those principles, subsequently articulated as federal statutory law in the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), require that each trustee's sole responsibility is to act in the interest of the employees who are participants and beneficiaries of the fund. A trustee cannot at the same time be a fiduciary, with sole loyalty to the employee participants and beneficiaries, and serve as the collective bargaining agent of the party that appointed him, with the loyalty to that party that such a role demands.

In Part II we show that the result of the court of appeals' decision in this case is contrary to the policy of Congress to encourage the development of multi-employer benefit trusts. Such trusts provide greater stability and security than single-employer trusts, and Congress

has acted to protect them in ERISA and again last year in the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208. The court of appeals' decision will make it impossible for unions to bargain effectively to establish or maintain employer participation in multiemployer funds, and will therefore frustrate the intent of Congress, not only in the Taft-Hartley Act but in these subsequent enactments.

## ARGUMENT

### I. TRUSTEES WHO ADMINISTER SECTION 302(c) FUNDS ARE NOT "REPRESENTATIVES FOR THE PURPOSES OF COLLECTIVE BARGAINING OR THE ADJUSTMENT OF GRIEVANCES" WITHIN THE MEANING OF SECTION 8(b)(1)(B), AND ARE FIDUCIARIES WHOSE SOLE RESPONSIBILITY IS TO THE EMPLOYEES WHO ARE PARTICIPANTS AND BENEFICIARIES OF THE FUNDS.

Section 8(b)(1)(B) makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1)(B). As this Court has recognized, Congress had a narrow purpose in enacting § 8(b)(1)(B):

> Both the language and the legislative history of § 8(b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances.

*Florida Power & Light Co.* v. *IBEW*, 417 U.S. 790, 803 (1974).[2] The Senate committee report on the bill that

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[2] In *American Broadcasting Co.* v. *Writers Guild*, 437 U.S. 411 (1978), the Court distinguished *Florida Power & Light*, and held that the NLRB was entitled to conclude that the union there had violated § 8(b)(1)(B) by the nature of the discipline it had imposed on supervisors. The *Writers Guild* case did not disapprove

was eventually enacted as the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley") explained the intended effect of § 8(b)(1)(B) as follows:

> This [section] proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purpose of collective bargaiinng or the adjustment of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.

S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947), 1 Leg. Hist. 427 (hereinafter "Senate Report").[3]

As the bill made its way through the Senate, its proponents repeatedly explained the concerns that prompted § 8(b)(1)(B) in narrow terms. One of those concerns, plainly inapplicable here, was to prevent unions from striking to force an employer to get rid of a supervisor who was strict with those he supervised, and to prevent unions from striking to force an employer to take a particular individual off, or put a particular individual on,

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any of *Florida Power & Light*'s discussion of the legislative history of the limited purposes of § 8(b)(1)(B); the basis of the decision was rather that the NLRB had acted within the scope of its discretion in applying § 8(b)(1)(B), and that its order was therefore entitled to judicial approval. See particularly *id.* at 430-431.

[3] The legislative history of the Taft-Hartley Act is reproduced in two bound volumes published by the National Labor Relations Board, entitled Legislative History of the Labor Management Relations Act 1947, and cited throughout this Brief as "Leg. Hist." For ease of reference, we have cited all references to House and Senate debates to this source.

its bargaining team. *See* 2 Leg. Hist. 1012 (Sen. Taft); 2 Leg. Hist. 1077 (Sen. Ellender).

The second concern was to "prevent unions from trying to force employers into or out of multi-employer bargaining units." *Florida Power & Light, supra*, 417 U.S. at 803. The question of multi-employer bargaining was one of the major issues that dominated the legislative proceedings in the House and the Senate. *See NLRB* v. *Drivers Local 449*, 353 U.S. 87, 94-96 (1957). The extensive debates on that issue demonstrate that § 8(b)(1)(B)'s prohibition of strikes to compel employers to join in multi-employer bargaining was the product of: (1) the perceived concentration of power in large national unions that enabled their leaders to call strikes affecting substantial segments of the nation's economy, and (2) the perceived danger that multi-employer bargaining gave large unions "monopoly power" over wages.[4]

In rejecting proposals to limit multi-employer bargaining, the majority of the Senate made the judgment that these perceived dangers could be adequately guarded against by leaving the formation of multi-employer bargaining arrangements to employer discretion.[5] To ensure

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[4] Senate Report 51, 1 Leg. Hist. 457; 2 Leg. Hist. 1240, 1246-1248 (Sen. Taft); *id.* 1059 (Sen. Ball).

For examples of similar statements in the House, see H.R. Rep. No. 245, 80th Cong., 1st Sess. at 8-9 (1977) (hereinafter "House Report"), 1 Leg. Hist. 299-300; 1 Leg. Hist. 612, 784 (Rep. Hartley); *id.* 673-674 (Rep. Fisher); *id.* 635-636 (Rep. Schwabe).

[5] One of the major concerns expressed by the opponents of the amendments proposed by Senators Taft and Ball to limit multi-employer bargaining was that they would restrict multi-employer bargaining even where employers had made that choice for their own benefit. See, e.g., Senate Minority Report No. 105, 80th Cong., 1st Sess. at 6-8 (1947) (hereinafter "Senate Minority Report"), 1 Leg. Hist. 468-469; 2 Leg. Hist. 1231-1234 (Sen. Kilgore); *id.* 1245-1246, 1273, 1281 (Sen. Ives); *id.* 1286, 1290-1291, 1297-1298 (Sen. Morse).

In the course of the debates, opponents of the amendments repeatedly emphasized that the bill as reported—with § 8(b)(1)(B),

that this decision would be a product of the employer's own evaluation of his interests, the bill prohibited unions from using strikes or other economic coercion to force an employer into a multi-employer bargaining unit.

The perceived dangers that led to § 8(b)(1)(B) do not counsel a like prohibition of union bargaining for employer contributions to or participation in a jointly administered fund established pursuant to § 302(c)(5). Congress expressly provided, as we show at pages 16, 19, *infra*, that the rights of employees in such trust funds must be defined in advance, thus precluding "bargaining" among the trustees on that subject. Congress further provided in § 302(c)(5)(B) that disputes between the employer and employee trustees could not lead to strikes or other exercises of economic power, but must be resolved by a neutral umpire. An association of various trustees, acting together for joint administration of a trust fund, therefore, can lead neither to a grant of "monopoly power" to a union in fixing wages nor to broad disruption of the economy through concerted strike action against a large group of employers. And three aspects of the legislative debate demonstrate that the 1947 Congress considered the problem addressed in § 8(b)(1)(B) to be wholly distinct from that addressed in § 302(c)(5), and also that Congress formulated separate and independent solutions for those problems.

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§ 8(b)(3) (making it an unfair labor practice for a union to refuse to bargain in good faith), and the NLRB's practice of creating a multi-employer bargaining unit only where employers voluntarily associated themselves for bargaining—would assure that multi-employer bargaining would occur only where both employers and unions desired such bargaining. See 2 Leg. Hist. 1244 (exchange between Sen. Ellender and Sen. Taft); *id.* 1233 (Sen. Kilgore). The proponents of the amendments agreed that the committee bill would have that effect. *Id.* 1219-1220 (Sen. Ball); *id.* 1241 (Sen. Taft).

A further discussion of the legislative history on the issue of multi-employer bargaining appears at pages 13-15, *infra*. *See also Florida Power & Light*, *supra*, 417 U.S. at 803 n.14.

*First*, the legislative history of § 302(c) shows that Congress did not intend in 1947 to prohibit strikes in support of union demands for employer participation in such multi-employer funds.

One of the events that shaped the legislative effort culminating in the Taft-Hartley Act was the demand by John L. Lewis in 1946, as a condition for settling an industry-wide coal strike, that all mining operations contribute 10 cents per ton into a central "welfare fund" to be administered exclusively by the United Mine Workers. *See United States* v. *Ryan*, 350 U.S. 299, 304-305 (1956).[6] The federal administrator who was then operating the mines pursuant to the War Labor Disputes Act agreed to a five-cent contribution to the UMW fund. John L. Lewis then gave notice that on July 1, 1947, when the Government's authority to operate the mines expired, he would again demand a ten-cent contribution from the mine operators into the UMW fund.[7]

The fear of another industry-wide coal strike, and concern about possible misuse of the contributions to the unrestricted UMW "welfare fund," became a focus of the legislative effort. The 79th Congress had passed a bill that would have dealt partially with these fears, but President Truman had exercised his veto and its supporters could not muster enough votes to override that veto. *See Arroyo* v. *United States*, 359 U.S. 419, 425 n. 6 (1959). In April 1947, when the 80th Congress began debate on amendments to the National Labor Relations Act, one of the recurring questions was what the legislature should do about the UMW demand.[8]

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[6] *See also* Senate Report, at 52, 1 Leg. Hist. 458; 1 Leg. Hist. 753 (Rep. Case); 2 Leg. Hist. 1305 (Sen. Byrd); *id.* 1310 (Sen. Taft).

[7] *See United States* v. *United Mine Workers*, 330 U.S. 258, 262 n. 1, 286 (1947); Senate Report 41, 1 Leg. Hist. 420; 1 Leg. Hist. 612 (Rep. Hartley); *id.* 754-755 (Rep. Fisher).

[8] The debates on both of these subjects are full of references to John L. Lewis and the Mine Workers. For examples, in the debates

The House passed a bill that contained three major provisions that would have prevented the UMW, by different means, from renewing its industry-wide demand for employer contributions to a welfare fund. One of those provisions would have prohibited multi-employer bargaining;[9] another would have excluded "welfare arrangements" from the subjects on which employers were required to bargain;[10] and a third would have prohibited employer contributions into any trust administered even partly by a union.[11]

The Senate, though likewise troubled by the UMW's bargaining demands,[12] would have none of the House's prohibitions on multi-employer bargaining and bargaining over welfare plans. The bill reported by the Senate

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on industry-wide bargaining, *see* 1 Leg. Hist. 612 (Rep. Hartley); *id.* 672-673 (Rep. Fisher: "Do we or do we not want to curb the power of John L. Lewis and his kind over the economic life of the Nation?"); 2 Leg. Hist. 1222, 1227 (Sen. Ball). Examples of references in the debates on union welfare plans are cited in note 5, *supra*. *See also* 1 Leg. Hist. 751 (Rep. Hartley); *id.* 754-755 (Reps. Fisher and Fernandez).

[9] Section 9(f)(1) would have prohibited any union from representing the employees of more than one employer (except for those in small plants located close together), and sections 2(16) and 12(a)(3)(A) would have prohibited unions representing different employers in the same industry from striking in support of concerted demands. H.R. 3020, §§ 2(16), 9(f)(1), 12(a)(3)(A), 1 Leg. Hist. 169-170, 187-188, 205; House Report, 8-9, 24, 35-36, 43-44, 1 Leg. Hist. 299-300, 315, 326-327, 334-335.

[10] H.R. 3020, § 2(11), 1 Leg. Hist. 163-167; House Report, 19-23, 31; 1 Leg. Hist. 310-314, 322.

[11] H.R. 3020 § 8(a)(2)(C)(ii), 1 Leg. Hist. 177-178; House Report 28-29; 1 Leg. Hist. 319-320.

A fourth provision in the House bill would have prohibited unions from compelling their members to participate in any insurance or benefit plans, apparently requiring the consent of each individual employee, so that group welfare arrangements could not even be financed through union dues. H.R. 3020 § 8(c)(3), 1 Leg. Hist. 180; House Report 30-31, 1 Leg. Hist. 321-322.

[12] See notes 6 and 8, *supra*.

Committee on Labor and Public Welfare defined mandatory subjects of bargaining broadly enough to include pensions, insurance and similar benefits, thereby maintaining union freedom to bargain and strike for employer contributions dedicated to these purposes.[13] And the Senate Committee bill contained no restriction on the establishment and administration of pensions or other "welfare" funds, and no restriction on multi-employer bargaining other than § 8(b)(1)(B), discussed above.[14]

Senators Ball and Taft did introduce a floor amendment to restrict multi-employer bargaining, which was debated at length over a period of three days.[15] Even that amendment would not have prohibited multi-employer bargaining entirely, as the House bill did, but would have allowed such bargaining only so long as it was voluntary on the part of every employer and every local union whose members were affected.[16] Nonetheless, the amendment was highly controversial, and was defeated by one vote.[17]

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[13] The Senate Minority Report, in explaining the vote of the Committee to reject the provision that became § 302(c)(5), stated:.

> In discarding these sections it was recognized that welfare funds of all varieties are proper subjects for free collective bargaining and that any fetters placed upon their normal development through voluntary and independent or cooperative action of management and labor are completely unjustified.

Senate Minority Report 23, 1 Leg. Hist. 485. *See* Inland Steel Co. v. NLRB, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). *See also* Allied Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 180 (1971).

[14] Senate Report at 2, 51-52, 1 Leg. Hist. 408, 457-458; Senate Minority Report at 6, 23, 1 Leg. Hist. at 468, 485; 2 Leg. Hist. 1012 (Sen. Taft).

[15] Senate Report 51-52; 1 Leg. Hist. 457-458; 2 Leg. Hist. 1217-1302.

[16] Senate Report 51, 1 Leg. Hist. 457; 2 Leg. Hist. 1300 (Sen. Taft).

[17] 2 Leg. Hist. 1302. After the vote, the prevailing side offered to allow a vote to reconsider. Senator Taft declined that offer, explaining:

> My feeling is that inasmuch as the division is so close and inasmuch as so many Senators feel strongly on one side of the

Immediately after that vote, the amendment that became § 302 was introduced on the floor of the Senate.[18] In the course of the debates, Senators Taft and Ball, the sponsors of the amendment made it plain that they knew of the existence of multi-employer welfare funds, and that they understood that unions were free to strike in support of demands for employer participation in welfare funds. In addition to the obvious example of the UMW fund,[19] there were references to other multi-employer funds maintained by unions or currently the subject of union bargaining demands.[20] Senator Taft's remarks reflected his understanding that unions had a right to bargain for such funds and to use economic weapons to force employers to participate in them:

> This amendment is, in effect, a provision to prevent the abuse of *the right to establish such funds by collective bargaining*, pending further study of the whole problem. . . . [*I*]*f such an agreement is forced upon an employer*, in effect we make the officials of the union who collect the tax Government agents for collecting and distributing the tax.

2 Leg. Hist. 1313 (emphasis added).

Although Senators Taft and Ball were thus aware that unions could strike in support of demands that employers participate in multi-employer welfare funds, the measure they proposed on this subject did not incorporate any of the various measures in the House bill that would have

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amendment, even if it were carried by one or two votes, it probably would not advance the progress of the bill, and it might lose votes for the bill.

2 Leg. Hist. 1309.

[18] *Id.* 1302.

[19] *Id.* 1312, 1315 (Sen. Taft).

[20] *Id.* 1312, 1318, 1322. The sponsors of the amendment also knew that union bargaining demands for such welfare funds were being made with increasing frequency. *Id.* 1305, 1319-1320 (Sen. Ball).

prohibited such a demand, or that would have prohibited a supporting strike. Instead, § 302(c)(5) merely restricted the form of such funds and specified certain features of the funds' administration.

Thus, despite the intense congressional interest in the proper scope of multi-employer bargaining, and the fact that the debate on that subject had just closed when § 302 was taken up, there was *no* attempt in the Senate to adopt any restrictions that would keep the UMW from striking in support of its expected demand for employer contributions to its welfare fund. Section 302(c)(5), both as proposed and as enacted, treats multi-employer funds exactly the same as it does single-employer funds, and nowhere in the debate over § 302 did any Senator suggest that the right to strike to secure a single employer fund of the sort described in § 302(c)(5) was in any way restricted.[21]

In fact, in the debate over § 302(c)(5), not a single Senator invoked the concept of voluntary association of employers in multi-employer *bargaining*, which had figured so prominently in the just-concluded debate on the Taft-Ball amendment addressed to that subject. The necessary inference is that the concerns discussed in debate over multi-employer bargaining—the concerns that motivated § 8(b)(1)(B)—were considered to be unconnected with the problem addressed by § 302(c)(5).

Nor did any Senator suggest that the amendment which became § 302(c)(5) would restrict bargaining for employer participation in multi-employer funds or prohibit strikes in support of such bargaining demands. On the contrary, Senators Ball and Taft repeatedly assured the Senate that this provision had a very limited purpose: to protect the *employees* whose labor produced the fund. In the closing minutes of the debate, Senator Ball made

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[21] The debates on that amendment appear at 2 Leg. Hist. 1302-1323.

the following statements about the limited purpose of § 302(c)(5):

> All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected.
>
> * * *
>
> . . . [A]ll we seek to do by the amendment is to make sure that the employees whose labor builds this fund and who are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled.

2 Leg. Hist. 1321-1322.[22] Senator Taft also represented that the only effect of § 302(c)(5) on existing funds would be to require employer representation in the fund's administration, 2 Leg. Hist. 1312, 1314. The amendment passed by a narrow margin. *Id.* 1323.

Subsequently, when the House conferees acceded to the Senate bill in all major respects,[23] and had to return to the House and report that they had conceded both the ban on industry-wide bargaining and the ban on welfare funds, 1 Leg. Hist. 882 (Rep. Hartley), they did not suggest that they had nonetheless succeeded in prohibiting John L. Lewis from renewing his demand for employer contributions to an industry-wide welfare fund, if that fund complied with § 302(c)(5). Neither the House Managers' statement attached to the Conference Report, nor the debates on the conference agreement contain any such suggestion.[24]

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[22] *See also id.* 1304 (Sen. Ball); *id.* 1311 (Sen. Taft).

[23] *Id.* 1526 (Sen. Taft).

[24] The House Managers' Statement is reprinted in 1 Leg. Hist. at 534. It stated that the "subject matter" of industry-wide bargaining "has been omitted from the conference agreement." H.R.

This legislative history alone compels the conclusion that Congress, in enacting the Taft-Hartley Act, understood that it had not prohibited unions from striking to obtain employer agreement to participate in any welfare fund, but that it had only regulated the form of those funds in the interest of employees.

*Second*, the language used in § 8(b)(1)(B) and in § 302(c)(5) confirms the discrete nature of the two provisions and of the concerns they address. The term "collective bargaining," as it is used in § 8(b)(1)(B), is defined by § 8(d); both of these provisions were enacted in 1947.[25] Section 8(d) states that collective bargaining is:

> [T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession....

This definition plainly describes the process by which the employer and the union attempt to reach an agreement by negotiation, and, failing agreement, are free to settle their differences by resort to their respective economic weapons of lockouts and strikes, without any com-

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Rep. No. 510, 80th Cong., 1st Sess. 59 (1947) (hereinafter "Conference Report"), 1 Leg. Hist. 563. The description of § 302 appears in Conference Report 59, 1 Leg. Hist. 570-571.

The House debates on agreeing to the conference report are in 1 Leg. Hist. 871-900.

[25] Both sections originated in S. 1126, 80th Cong., 1st Sess. Title I, 1 Leg. Hist. 112, 114-115.

pulsion to reach agreement. The freedom from government compulsion to reach agreement and the right to resort to economic weapons are at the "core" of the collective bargaining process contemplated by Congress. *Bus Employees* v. *Missouri*, 374 U.S. 74, 82 (1963). See also *Carbon Fuel Co.* v. *Mine Workers*, 444 U.S. 212, 219 (1979), and cases cited therein.

The process of "adjustment of grievances" as contemplated by Congress is similarly based on the concept that either party is free to reach agreement or not, without governmental compulsion. When § 8(d) as passed by the Senate was submitted to Conference, the provision included a requirement that the parties meet and confer with respect to "the negotiation of an agreement, or the settlement of any question arising thereunder." H.R. 3020 (Senate version) § 8(d), 1 Leg. Hist. 242. The conferees omitted the phrase "the settlement of," explaining that those words "might have been construed to require compulsory settlement of grievance disputes and other disputes over the interpretation or application of the contract." Conference Report at 35, 1 Leg. Hist. 538. Congress also expressed the principle of voluntary rather than compulsory arbitration in § 203(d) of the LMRA, 29 U.S.C. § 173(d), also enacted as part of Taft-Hartley. Section 203(d) provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

*See e.g.*, *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Rather than compelling the resolution of grievances by arbitration, Congress merely expressed a preference that unions and employers provide for arbitration by contract. *See also*, *e.g.*, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960); *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 382 (1974).

Throughout the legislative history of Taft-Hartley, the sponsors of the legislation took special pains to declare that the principle of free collective bargaining would be preserved, with no compulsory arbitration of disputes, either in the negotiation of contracts or in their interpretation.[26]

The process established by § 302(c)(5) is totally different from the processes of collective bargaining and the adjustment of grievances, as Congress conceived the latter. The function of the trustees of a § 302(c)(5) trust is described as "administration," § 302(c)(5)(B). The trustees operate under a written agreement between the union and the employers, itself the product of collective bargaining under § 8(d). That agreement must specify "the detailed basis upon which [benefit] payments are to be made" from the fund, *id.* The functions of a trustee in administering the trust fund are thus "of a far different order than [the] duties [of a] collective bargaining agent," as this Court held in *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170 (1971).

In addition, the provisions governing dispute resolution in administration of a § 302(c)(5) trust are wholly at odds with the concept of collective bargaining and grievance adjustment embodied in the National Labor Relations Act. The trustees of such a trust, unlike representatives for collective bargaining or grievance adjustment, are not left free to deadlock on important questions of trust administration. Nor is it left to the parties to decide whether they will provide an arbitration mecha-

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[26] Senate Report at 13-14, 1 Leg. Hist. 419-420. Senator Taft, the bill's sponsor, insisted in debate that the bill was based upon "the theory of the Wagner Act" that labor disputes should be solved through "free collective bargaining" rather than compulsory arbitration. 2 Leg. Hist. 1653. *See also id.* at 1008, 1520. The Conference change in the language of § 8(d), described above, is further evidence of this special care to avoid compulsory arbitration in the collective bargaining arena.

nism to resolve disputes over interpretation or application of the trust agreement that arise in the administration of the trust. Section 302(c)(5)(B) requires the union and employer to provide a mechanism for resolving such disputes. If they do not provide such a mechanism, and if there is a deadlock between the employer and the employee representatives in administration of the trust, the statute authorizes the court to appoint an umpire to resolve the dispute. It is inconceivable that the Congress, which took such pains to be certain that the concept of collective bargaining and grievance adjustment allowed no possibility of compulsory arbitration, nonetheless considered that the process of trust administration described in § 302(c)(5)(B), with a compulsory mechanism for dispute resolution, constituted collective bargaining or grievance adjustment within the meaning of § 8.

The basis for the Third Circuit's contrary decision in this case is its belief that Congress, in requiring employers to be represented in fund administration, expected that the employer and employee representatives would engage in "ongoing collective bargaining," with the employer trustee advancing the particular interests of the employer and the union trustee advancing the particular interests of the union, and that representation of the opposing interests was "essential to the operation of section 302(c)(5)." NLRB Pet. App. 13a-14a. That view has no support in the legislative history of § 302(c)(5). That history shows that Congress insisted on having employer representatives take part in fund administration not to further any interest of employers but solely to protect the interests of the employees whose labor had produced the fund. Page 16, *supra*.

The primary means by which this aim was to be accomplished was the requirement that the money be held in trust under a written agreement defining the purposes for which the money could be spent, and thus creating in

the employees a right to the prescribed benefits. That requirement was described by Senator Ball as "the heart of the amendment." 2 Leg. Hist. 1321.[27]

The provision for joint administration of the fund was regarded as a secondary means for achieving the same purpose. Senator Taft, upon being questioned on the floor of the Senate about the reason for requiring joint administration, responded, "This is, in a way, a stopgap provision until a further study can be made, in order that abuses may not arise." 2 Leg. Hist. 1313. In fact, opponents of the amendment objected to the joint administration requirement on the ground that many employers regarded that obligation as a burden.[28] At no point in the debate on this issue did the sponsors of the amendment counter those statements or state that it was necessary or desirable for the interests of employers to be represented in the administration of the funds.[29] On the contrary, they repeatedly stated that their sole purpose was to protect the interests of the employees in the

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[27] *See also* 2 Leg. Hist. 1311-1312. In that passage Senator Taft explained the purpose of the trust requirement:

> The purpose of the amendment is to require that the fund shall be established in definite, detailed form, in the form of a trust fund, with respect to which the employees can determine their rights and can insist upon them.

*Id.* at 1312.

[28] Senator Murray made the following statement in the floor debates:

> As a matter of fact, there are many employers who, having agreed to the establishment of such funds as the result of free and voluntary collective bargaining, would object strenuously to any measure compelling them to join in the administration of the funds. For them, it would mean additional record keeping, resulting in increased costs, and requiring them to devote a part of their time and energy to the supervision of activities which are not of direct concern to them.

*Id.* at 1316. *See also id.* at 1315 (Sen. Ives); *id.* 1319 (Sen. Morse).

[29] The debate on this amendment appears at 2 Leg. Hist. 1302-1323.

fund.[30] In effect, the proponents of the amendment drafted employer representatives to serve as watchdogs in order to keep union officials from using money for purposes not permitted by a trust agreement. *See* 2 Leg. Hist. 1321 (exchange between Senators Barkley and Ball). *See also Denver Metro. Ass'n* v. *Journeyman Plumbers*, 586 F.2d 1367, 1374-75 (10th Cir. 1978).[31]

*Third*, as just noted, Congress enacted § 302(c)(5) to ensure that monies paid into labor-management pension and welfare funds can be used only for the specific and defined purposes of the fund. The mechanism chosen to promote this end was the trust. This choice further confirms the distinct nature of § 8(b)(1)(B) representatives and § 302(c) trustees.

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[30] *See* page 16, *supra*; *id.* at 1312 (Sen. Taft); *id.* at 1321 (Sen. Ball). The only statement by any Senator on this amendment that suggests any concern for the interests of employers is a statement made by Senator Wiley, who was neither a member of the Committee on Labor and Public Welfare nor a sponsor of the amendment, *id.* at 1469, made after the amendment was adopted, describing it as a provision "giving employers their rightful voice in the administration of union welfare funds and limiting the uses for which the money may be spent." *Id.* at 1471. Senators Ball and Taft, in their efforts to obtain passage of the bill and later to override the presidential veto, continued to declare that the sole purpose of § 302 was to protect the interest of the employees. *See id.* at 1498, 1640; *id.* at 1524, 1627 (radio speeches made while the legislative effort was still underway, and reprinted in the Appendix to the Congressional Record). In that context, no weight can be accorded to Senator Wiley's statement.

[31] In construing another provision of Taft-Hartley, which, like this one was the subject of floor debates in which Senator Taft assured the Senate of its limited purpose, this Court stated: "[Senator Taft's] view of the limited reach of § 610, entitled in any event to great weight, is in this instance controlling." *Pipefitters* v. *United States*, 407 U.S. 385, 409 (1972). The same weight should be accorded to the statements of Senators Taft and Ball on § 302(c)(5).

The common law principles of trust on which Congress relied in § 302(c)(5) leave no room for doubt as to the duties and obligations of fund trustees, and likewise do not tolerate the opposing duties and obligations that § 302 trustees would have if they were deemed to be the bargaining representatives of their appointing parties under § 8(b)(1)(B). The essential obligation of a § 8(b)(1)(B) representative is to be completely loyal to the party he represents in that process. The trustee's fundamental obligation, by contrast, is to the participants and beneficiaries of the fund, not to his appointing party. Bogert, Trusts & Trustees § 543 at 197-98 (2d rev. ed. 1978). *See also* Restatement of the Law of Trusts, Second § 170.

Pre-ERISA lower federal court decisions consistently recognized that trustees of § 302(c)(5) trust funds are bound by the strict common law duty of loyalty to the participants and beneficiaries of the trust. For example, in *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968), the Court of Appeals for the District of Columbia Circuit observed, "the trustees' duties are those of fiduciaries because *as trustees* they perform a separate function and do not act as representatives of either the employers or the union." *Id.* at 865, n. 5 (emphasis in original).

The Court of Appeals for the Ninth Circuit has similarly concluded that fund trustees have a duty to exercise "independent judgment" in matters of trust administration, a conclusion plainly at odds with the Third Circuit's imposition of § 8(b)(1)(B) duties on fund trustees.[32] *See Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1975):

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[32] It should also be noted that the Third Circuit itself had earlier recognized this fiduciary duty of trustees of Section 302(c)(5) funds in two cases decided some twenty years before the decision now under review. United Marine Division v. Essex Transportation Co., 216 F.2d 410 (3d Cir. 1954); Mechanical Contractors Ass'n v. Local Union 420, 265 F.2d 607 (3d Cir. 1959).

> Recommendations of collective bargaining parties may be adopted by the trustees in the exercise of their discretion, but such recommendations are not binding or obligatory.

In 1974, Congress enacted ERISA, which gave statutory force to the basic common law trust principles previously applied in interpreting § 302(c). ERISA reconfirms that fund trustees are fiduciaries,[33] whose obligation under § 404 is to act "solely in the interest of the participants and beneficiaries" of the fund. 29 U.S.C. § 1104(a)(1). This statutory obligation tolerates no divided loyalties of the kind mandated by the decision below. *Cf. NLRB* v. *Construction & General Laborers' Local 1140*, 577 F.2d 16, 21 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979); *Blassie* v. *Kroger Co.*, 345 F.2d 58, 75-76 (8th Cir. 1965).

The duties set forth in § 404 of ERISA reflect a federal codification and elaboration of the common law prudent man rule and the requirement of undivided loyalty to the participants and beneficiaries. Clearly a fund trustee cannot serve two masters: he cannot exercise undivided loyalty to the trust fund participants and beneficiaries and at the same time be completely faithful to the party that appointed him, as § 8(b)(1)(B) would require if he also were a collective bargaining representative.

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[33] *See* § 3(21) of ERISA, 29 U.S.C. § 1002(21). Other provisions of ERISA emphasize the strict fiduciary nature of the trustees' obligations. For example, Section 406(b)(2) prohibits a trustee from "act[ing] in any transaction involving the plan on behalf of a party (or represent[ing] a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries," 29 U.S.C. § 1106(b)(2), and ERISA Section 405 makes one fiduciary liable for a co-fiduciary's breach of his obligations in certain circumstances. 29 U.S.C. § 1105. Section 406(a)(1)(E) and 407 limit the amount and kind of employer property and securities that a trust may acquire. *See* 29 U.S.C. §§ 1106(a)(1)(E), 1107.

## II. THE THIRD CIRCUIT'S DECISION WOULD SERIOUSLY DISRUPT THE ADMINISTRATION OF MULTI-EMPLOYER TRUST FUNDS, AND IS AT ODDS WITH THE CONSISTENT INTENT OF CONGRESS TO AUTHORIZE AND ENCOURAGE SUCH FUNDS.

The Third Circuit's ruling that trustees of § 302(c) trust funds are "representatives for purposes of collective bargaining" within the meaning of § 8(b)(1)(B) will seriously disrupt the administration of—and indeed threaten the very existence of—multi-employer benefit funds.

The result of the Third Circuit's ruling is that *each* employer has the right to select *all* the management trustees. Since it is impossible, by definition, for every employer participating in a multi-employer fund to have sole control over the selection of all of the employer-appointed trustees, the Third Circuit's holding will necessarily preclude all use of economic weapons in support of union demands that employers provide pension or welfare benefits to employees through multi-employer trust funds.[34] That result is contrary to the expressed intent of Congress to authorize and encourage such funds, which offer a stability and security that frequently cannot be afforded by smaller funds.[35]

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[34] Even if one were to conclude that the Third Circuit's holding required only that each employer be allowed to select its own trustee for any § 302(c) benefit fund, that would, as recognized by the National Labor Relations Board, "severely impair the continued development of such plans . . . . This is especially so in view of the equal representation requirement of Section 302(c)(5)(B), which would lead to a concomitant increase in the number of union trustees." Sheet Metal Workers' International Ass'n, 234 N.L.R.B. 1238, 1245, 97 L.R.R.M. 1476, 1484 (1978), petition for review pending sub nom. Central Florida Contractors Ass'n v. NLRB, No. 79-2396 (5th Cir. 1979).

[35] The National Labor Relations Board recently commented on this point in holding that the trustee designation clause of amicus

As we noted in Part I, at pages 11-17, *supra*, the legislative history of Section 302(c) demonstrates that Congress decided in 1947 not to prohibit strikes in support of union demands for employer participation in such multi-employer funds, but rather to regulate the form of those funds to protect the interests of the employees for whose benefit they were established. In the years since 1947, Congress has acted on two occasions to encourage—rather than frustrate—the development of multi-employer benefit funds. ERISA, enacted by Congress in 1974, made specific provision for multi-employer plans. *See, e.g.*, Internal Revenue Code § 414(f), 26 U.S.C. § 414(f), 29 U.S.C. § 1002(37). Congress thus contemplated that employer funds would continue to be mandatory subjects of bargaining, and that unions would be able to bargain to impasse and strike over that subject. This view is confirmed by the recently-enacted Multiemployer Pension Plan Amendments Act of 1980, one of the express purposes of which is "to encourage the

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SASMI—a provision that effectively binds employers and local unions entering SASMI to accept the existing trustees until their successors are appointed in accordance with the trust fund provisions—is a mandatory subject of bargaining. As the Board stated:

> If it is true, and we think that it is, that a multiemployer fringe benefit plan can usually operate in a more efficient and financially secure manner than an individual single-employer plan, then certainly the [unions] are privileged to bargain to impasse over such a plan. Similarly, we also consider it to be true that, in order to effectively administer such a plan through the medium of a multiemployer trust fund, the number of trustees must be limited to a reasonable figure. In the instant proceeding, the trustee designation clause is nothing more than the mechanism by which the composition of the board of trustees is so limited.

Sheet Metal Workers' International Ass'n, 234 N.L.R.B. 1238, 1244, 97 L.R.R.M. 1476, 1483 (1978), *review pending*, Central Florida Sheet Metal Contractors' Ass'n, Inc. v. NLRB, No. 79-2396 (5th Cir. 1979). *See also* United Slate, Tile & Composition Roofers, Local No. 220, 177 N.L.R.B. 632, 651, 76 L.R.R.M. 1016 (1969).

growth and maintenance of multiemployer plans." H. Rep. 96-869, 96th Cong. 2d Sess. Part I at 71, Part II at 4, 12 (1980). *See* Section 3(c)(2), Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1209 (1980). The Third Circuit's decision cannot be reconciled with that purpose.

It is thus clear that Congress did not intend the incongruous results that will follow if the Third Circuit's decision is allowed to stand. Multi-employer trust funds had been in operation for more than 25 years when Congress enacted ERISA. Congress obviously is familiar both with such multi-employer funds, and with the collective bargaining process and the undivided loyalty the parties demand of their collective bargaining representatives. It defies logic to suggest that Congress would have enacted the strict fiduciary standards of ERISA if Congress thought that the trustees of such multi-employer funds also owed the obligations to their appointing parties that § 8(b)(1)(B) would impose if they were collective bargaining representatives.

This Court has often recognized that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The Third Circuit's unduly expansive construction of § 8(b)(1)(B) of the NLRA ignores this settled principle of statutory construction, and frustrates congressional efforts to encourage the growth and maintenance of multi-employer plans and to impose strict fiduciary duties on the trustees of all Section 302(c) funds.[36]

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[36] The legislative history of the recently enacted Multiemployer Pension Plan Amendments Act of 1980 reveals that Congress does not accept the Third Circuit's decision in this case. For example, Senator Randolph referred specifically to the decision below, expressed the opinion that the case would be "overturned on appeal," and asked whether Congress had "ever expressed an intent under

## CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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ERISA or any other Federal law that an agency status should or does exist between trustees and their appointers." 126 Cong. Rec. S 10104 (daily ed. July 29, 1980). Senator Williams, the sponsor of the 1980 amendments, responded that "[i]n all instances the actions of the trustees must be made with the sole interest of the plan's beneficiaries in mind." *Id.* Similarly, in the House, Congressman Thompson referred to the Third Circuit decision as "an erroneous interpretation of both ERISA and federal labor law [which] does not reflect congressional intent." 126 Cong. Rec. H 7902 (daily ed. August 26, 1980).

These recent expressions of legislative intent, although not determinative with respect to the purpose of earlier legislation, are clearly a relevant consideration, especially since the recent amendments are "another major step in an evolving pattern of regulation." NLRB v. Allis-Chalmers Manufacturing Co., 388 U.S. 175, 194 (1967).